



In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1338

COLEMAN-AMERICAN COMPANIES, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner, Coleman-American Companies, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. A1-A3) is unpublished and will not be reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1979. Petitioner did not file a motion for rehearing or rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the appellate court, affirming the trial court, granting disclosure of certain grand jury documents for use in court proceedings, prior to indictment and while the grand jury proceedings were still ongoing, is in conflict with an applicable decision of this court and with applicable decisions of other courts of appeals, to-wit:

(a) As to documents which are otherwise subject to an audit by an administrative agency of the United States,

(1) whether the trial court may order disclosure of grand jury documents without a showing of particularized need;

(2) whether the holding of the *Interstate Dress Carriers* case, 280 F.2d 52 (2nd Cir. 1960), may be applied to permit disclosure

(3) (a) when there is an ongoing grand jury investigation; (b) when there is proof that the ongoing grand jury investigation has been subverted; (c) when Rule 6(e), Federal Rules of Criminal Procedure does not authorize disclosure of grand jury documents even when such documents are otherwise subject to audit and inspection by an administrative agency;

(b) As to documents which are not otherwise subject to audit by an administrative agency of the United States, whether the trial court may order disclosure of such documents

(1) when the only showing of "particularized need" by the United States was that it was administratively convenient for the Department of Health, Education and Welfare to use such documents;

(2) when there was an offer of proof rejected as irrelevant by the trial court showing that the grand jury process had been subverted by improper disclosure of grand jury documents by the Government;

(3) when there was no showing that such documents would be used in a "judicial proceeding" within the meaning of Rule 6(e), Federal Rules of Criminal Procedure.

2. Whether the decision of the appellate court (not discussed in its opinion) granting Petitioner leave to appeal the decision of the trial court under the provisions of 28 U.S.C. 1651, or under the provisions of 28 U.S.C. 1292(b) is in conflict with decisions of other courts of appeals.

STATUTORY PROVISIONS INVOLVED

Rule 6(e), Federal Rules of Criminal Procedure.

(e) Secrecy of Proceedings and Disclosure.—

(1) General Rule.— A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2) (A) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.—

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury,

other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) Sealed indictments.— The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the issuance and execution of a warrant or summons.

Title 28, U. S. Code, Section 1292(b).

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Title 28, U. S. Code, Section 1651.

Section 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT

(a) Procedural History:

Petitioner Coleman-American Companies, Inc. (hereinafter "Coleman") appealed from an order of August 10, 1978 of the Honorable William Becker, Senior Judge of the United States District Court for the Western District of Missouri, which order permitted the disclosure of certain grand jury materials to the United States of America (Appellee) for use purely by the Department of Health, Education & Welfare and attorneys representing that Department, both in connection with one pending lawsuit and in connection with certain other administrative proceedings. On August 24, 1978, Judge Becker entered his order granting a certification under Title 28, Section 1292(b) so as to permit Coleman to pursue an interlocutory appeal of his order. On September 5, 1978 Coleman petitioned the United States Court of Appeals for the Eighth Circuit for an order permitting an interlocutory appeal, or in the alternative, for a writ of mandamus. On September 22, 1978, that Honorable Court entered its order permitting Coleman to take an interlocutory appeal.

(b) History of This Case in the Trial Court:

On June 22, 1978, the United States of America filed an "Application for Court Order Allowing Disclosure of Matters Occurring Before a Federal Grand Jury" with suggestions in support, hereinafter referred to as "Application" or "Suggestions" (June 22, 1978).¹ On June 22,

1. The Record in this case consists of the pleadings filed by the parties, hereinafter referred to by the title of the pleading with the date filed, e.g., "Application filed June 22, 1978"; the Transcript of the Hearing before Judge Becker on June 26, 1978, hereinafter "Tr. p."; and the orders of Judge Becker, hereinafter referred to by date, e.g., "Order, June 22, 1978."

1978, the Honorable William Becker, Senior Judge of the United States District Court for the Western District of Missouri, entered an "Order for Hearing on Application for Order Allowing Disclosure." On June 26, 1978, a hearing was held before Judge Becker on the Government's "Application" (Transcript of Proceedings of June 26, 1978). Prior to this hearing, the Court ordered that a copy of the Government's Application be served upon all interested parties, including Coleman (Tr. pp. 2, 3, 33, 46-47) and also permitted Coleman to appear at the hearing in opposition to the motion (Tr. pp. 2-3, 47).

The Government sought in its "Application" an order of the Court permitting disclosure of certain categories of documents pursuant to Rule 6(e)(2)(C)(i) of the Federal Rules of Criminal Procedure.² The Application sought disclosure of (a) "certain documents which may be considered to have been provided to the Grand Jury pursuant to a subpoena issued May 21, 1976 to James F. Coleman, with a return date of June 15, 1976 . . ." (Application, p. 1); (b) "certain documents which may be considered to have been produced pursuant to Grand Jury subpoena issued July 22, 1976, to Home State Bank, with a return date of July 27, 1976 . . ." (Application, p. 2); (c) "certain knowledge of Federal Agents who may be considered to have assisted the Grand Jury and the office of the United States Attorney in the investigation by examining various records at 3435 Broadway, Kansas City, Missouri 64111, which records were located outside the Grand Jury at the times of such investigation or examination . . ." (Application, pp. 2-3).

2. The Rule as pertinent to this proceeding provides that disclosure of matters occurring before the grand jury may be made "(i) when so directed by the court preliminarily to or in connection with a judicial proceeding. . . ."

As an alternate theory, the Government sought disclosure from the Court as to certain of the documents which, it believed, it had a right to examine pursuant to 45 C.F.R. 177.62(d), these documents, the Government urged, being not "matters occurring before the Grand Jury" under the holding in *U.S. v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2nd Cir. 1960) (Application, Suggestions in Support, pp. 2-4). As to documents other than the Government felt it had a right to examine pursuant to regulations, the Government urged the Court to grant disclosure under Rule 6(e) (2) (C) (i) on the basis that it had or could show to the Court a "particularized need" for such documents (Application, Suggestions, pp. 4-7).

At the hearing held before Judge Becker, the parties discussed as to which of the Grand Jury documents were in fact subject to inspection pursuant to 45 C.F.R. 177.62(d) (Tr. pp. 7-15, 17-20, 26, 31-32, 34-37). Ultimately, the Court granted disclosure as to certain of the documents as "not being matters occurring before the Grand Jury", pursuant to the holding in the *Interstate Dress Carriers* case, cited *supra* (Order of August 10, 1978, para. 2, and Exhibit A to the Order). As to the other Grand Jury documents for which disclosure was sought, the Court found a "particularized need" and ordered disclosure to the Government (Order of August 10, 1978, para. 3, pp. 2-4).

It was agreed and stipulated between the parties that the Grand Jury investigation of Coleman was still continuing, with witnesses scheduled to appear in the near future (Tr. pp. 43-44, 54-55).³

3. The Grand Jury investigation continues, as witnesses and documents were subpoenaed to the Grand Jury by the Government as late as February, 1979.

The factual basis for the Government's assertion that it had a "particularized need" for the grand jury documents was that there was pending a "judicial proceeding" entitled *Edutronics Systems, International, Inc. v. Department of Health, Education and Welfare* (hereinafter "HEW"), a civil matter pending in the U. S. District Court for the Western District of Missouri. The Government also sought disclosure "preliminarily to certain judicial proceedings in said Court which will or may be filed by the Commerce Bank of Kansas City, the American Bank & Trust Company, the American National Bank, the Broadway National Bank, Civic Plaza National Bank, Douglas State Bank, Westgate State Bank, Home State Bank, all of which have filed administrative claims with this applicant." (See Application, p. 1, Tr. pp. 5-6; 28-31). Edutronics was identified as a subsidiary of Coleman (Tr. p. 28). The Government indicated that its purpose in seeking disclosure was convenience, i.e., it did not want to have to spend additional time and expense in reauditing Coleman (Tr. pp. 34-35; 37).

Coleman offered to prove that the Grand Jury process had been subverted, in that documents for which disclosure was sought had already been used by civil agents of "HEW" (without a court order) in settling claims with the American National Bank of St. Joseph, Missouri, said claims being civil in nature. This offer of proof was rejected by the Court as being irrelevant (Tr. pp. 38-47; 21-22; Coleman's Initial Suggestions in Opposition to the Application for Disclosure, pp. 2-3).

After the Court entered its Order on August 10, 1978, upon application of Coleman, the Court on August 24, 1978, entered its Supplemental Order which granted Coleman a certification under 28 U.S.C. 1292(b), certifying that there was a controlling question of law as to which

there was a substantial ground for difference of opinion and that an immediate appeal from its order would materially advance the ultimate termination of litigation.⁴

As mentioned above, the appellate court affirmed the trial court rulings in this matter on January 31, 1979.

REASONS FOR GRANTING THE WRIT

1. As to documents otherwise subject to an audit by an administrative agency of the United States,

1.(a) The decision of the court below is in conflict with an applicable decision of this Court because (1) the trial court may not order disclosure of grand jury documents without a showing of particularized need; (2) the holding of the *Interstate Dress Carriers* case (280 F.2d 52 (2nd Cir. 1960)) may not be applied to permit disclosure (a) where there is an ongoing grand jury investigation; (b) when there is proof that the ongoing grand jury investigation has been subverted; (c) when Rule 6(e), Federal Rules of Criminal Procedure does not authorize disclosure of grand jury documents even when such documents are otherwise subject to audit and inspection by an administrative agency.

In *U.S. v. Interstate Dress Carriers*,⁵ the court held certain records which a grand jury had obtained by way of a subpoena duces tecum could be examined by the

4. See the Court's "Ruling on Letter Objections of Coleman American Companies Submitted In Camera" (entered August 14, 1978).

5. 280 F.2d 52, at p. 54 (2nd Cir. 1960). The court also, at p. 54, determined that Rule 6(e) was not violated in the circumstances of the case, further distinguishing it from the facts of the instant case. The case of *In re Grand Jury*, 24 Cr.L. 2171 (5th Cir. 1978), is not to the contrary, as that case involved disclosure of grand jury documents after the grand jury proceedings had terminated, and only government attorneys were authorized to use the grand jury materials.

Interstate Commerce Commission because this agency had a right under its regulations to inspect and audit such records regardless of grand jury proceedings.

However, it appears that the grand jury investigation in this case had ended, as the court noted that inspection by the ICC "will not impinge upon the secrecy of the grand jury proceedings," making this case distinguishable from the facts of the instant case, where an ongoing grand jury case was and is still in progress.⁶

And, a full reading of the *Interstate Dress Carriers* case indicates that the court was ... fact applying the standard of "particularized need".

However, the Court in the instant case did not apply the requirement of "particularized need" as to those documents which it ordered disclosure of pursuant to the holding in the *Interstate Dress Carriers* case.

In any event, the exception enunciated by the *Interstate Dress Carriers* case finds no support in Rule 6(e), Federal Rules of Criminal Procedure. Congress, in its recent consideration of the 1977 Amendment to Rule 6(e), noted that the 1977 Amendment was directed only to disclosures to Government personnel without a court order as to criminal investigations. Congress specifically cited the test set out in *U.S. v. Procter & Gamble*, 356 U.S. 677, at pp. 683-84 (1958) (which requires a showing of particularized need before disclosure of grand jury documents), as applicable when a court order was sought and made no

6. The facts of the *Interstate Dress Carriers* case may be distinguished also from the instant case in that the issues in the criminal investigation would necessarily be different from those in the civil aspects of the case, particularly since the claims of the banks against HEW would not be affected by any alleged conduct of Coleman. Compare, *In the Matter of the Grand Jury Investigation (General Motors Corp.)*, 210 F.Supp. 904 (S.D. N.Y. 1962).

mention of the *Interstate Dress Carriers* case. See 113 Congressional Record H-7867 (July 27, 1977); Senate Report No. 95-354, at 8 and Note 13, 1977 U.S. Code Congressional & Administrative News 1482.

Thus, the Court's holding below was in direct conflict with this Court's holding in *U.S. v. Procter & Gamble*, cited *supra*.

This Court in *U.S. v. Procter & Gamble* also held that a precondition of granting disclosure under Rule 6(e) was that there had been no abuse of the grand jury process. As the record reflects, the Honorable Trial Court in ordering disclosure as to certain of the Grand Jury documents declined to follow the holdings of *U.S. v. Procter & Gamble* and instead, it is respectfully urged, liberally applied the doctrine of the *Interstate Dress Carriers* case.⁷

Thus, the Court was in error in ordering disclosure of certain grand jury documents pursuant to the *Interstate Dress Carriers* case.⁸

1.(b) As to documents which were not otherwise subject to audit by an administrative agency of the United States, the order of the court below is in conflict with a decision of this Court and with decisions of other Courts of Appeals because (1) "administrative convenience" is not a sufficient showing of "particularized need", especially where the grand jury process was ongoing; (2) grand jury

7. Although the Court's Order (Exhibit E) did make a finding that no abuse of process was shown, and it appears that this finding applied to all of the documents in question for which disclosure was ordered, it is clear from the record that abuse of grand jury process was not a consideration of the court in ordering disclosure under the *Interstate Dress Carriers* case.

8. The Grand Jury documents ordered disclosed pursuant to the *Interstate Dress Carriers* case should not have been disclosed if the Court had applied the "particularized need" standard as to them. See Discussion, *infra*, regarding applicability of the "particularized need" standard to the facts of this case.

documents cannot be disclosed where there is a showing of abuse of the grand jury process; (3) when there was no showing that the documents were to be disclosed in a "judicial proceeding" within the meaning of Rule 6(e), Federal Rules of Criminal Procedure.

(1) The Trial Court's finding and order that a "particularized need" was shown as to certain documents was, it is respectfully urged, not justified on the facts of this case. (It is respectfully urged that this discussion as to the showing of "particularized need" should be considered by this Court as to all of the documents, even those ordered disclosed under the doctrine of the *Interstate Dress Carriers* case, since appellant contends that the showing of "particularized need" was necessary as to all documents.) This is so because all that was shown by the Government was that it would be more convenient for "HEW" to proceed with disclosure of the Grand Jury documents than by a new audit. The cases clearly hold that administrative convenience is not a sufficient showing of "particularized need" to justify disclosure of Grand Jury materials. See, e.g., *In re Grand Jury Proceedings*, 309 F.2d 440 (3rd Cir. 1962).

In any event, there was no showing of "particularized need" sufficient to overcome the policies underlying grand jury secrecy.

These policies were enunciated in *U.S. v. Procter & Gamble*, cited *supra*, at p. 681, N.6, as follows:

"(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses

who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." (Emphasis added.)

This case involves the first reported instance where a court has granted disclosure of grand jury materials while the grand jury was still investigating. As the Court in *Capitol Indemnity Corporation v. First Minnesota Construction Company*, 405 F.Supp. 929 (D. Mass. 1975), has noted:

"No case providing the United States Attorney free rein to use grand jury material in his preparation of a civil case while the grand jury investigation is still pending has been brought to the court's attention or disclosed by the court's research.

"In a strongly-worded opinion, Judge Frankel cautioned against the dual use of grand jury material for criminal and civil proceedings. In denying the United States attorney request that IRS agents be permitted access to grand jury material for the purpose of determining criminal or civil liability, he wrote

'It is my conclusion . . . that the grand jury's role is properly confined, and amply respected, when it is held empowered to conduct investigations that are in their inception exclusively criminal. To hold otherwise—to confer court approval upon the kind of concurrent criminal and civil inquiries projected by the instant application—would expand the already awesome powers of the grand jury beyond tolerable limits.' *United States v. Doe*, 341 F.Supp. 1350, 1352 (S.D.N.Y. 1972).

"Faced with similar issues, other courts have either suppressed the documents in the civil case, e.g., *In re April 1956 Term Grand Jury*, 239 F.2d 263, 272 (7th Cir., 1956), or more frequently, permitted equal access to the grand jury material, e.g., *United States v. Procter & Gamble Co.*, 187 F.Supp. 55, 64 (D.N.J. 1960). Neither of these after the fact approaches would appear as clear, certain and equitable as a rule precluding concurrent civil access to grand jury material without permission of the court.

'It is true, of course, that many or most areas of law enforcement involve the alternate or cumulative prospects of both civil and criminal proceedings by the Government. But this is no justification for allowing the intentional use of a strictly criminal weapon (with a potency supposedly justified by its grave function) for the combined purposes.' *United States v. Doe*, 341 F.Supp. at 1352.

"The aforesaid concerns are aggravated by the fact that in this case the United States Attorney's civil client is an administrative agency. Necessarily the case will be reviewed with HUD officials and attorneys. It is questionable whether such review should include grand jury material.

If it had been intended that the attorneys for the administrative agencies were to have free access to matters occurring before a grand jury, the rule [Rule 6(e)] would have so provided.

"Permitting an administrative agency access to grand jury material while the grand jury is still conducting its investigation creates a number of potential problems among them being erosion of congressional limitation on agency power, the possible chilling effect on

potential witnesses and undue agency influence on the course of grand jury inquiry.

"The more common occasion for administrative agency access to grand jury material is where the agency assists the United States Attorney in its presentment or evaluation. But even in such limited and controlled circumstances '[i]t is impossible to delineate, either from . . . the cases, or the Rule itself just what "types" of government agencies may, for purposes of Rule 6(e), assist the United States Attorney.' *In re Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 475 n. 30 (E.D. Pa., 1971). (FN-2).

"(FN-2) The problem is discussed in detail in a comprehensive law review article. Note, *Administrative Agency Access to Grand Jury Materials*, 75 Colum.L. Rev. 162 (1975)."

Under these facts showing abuse of the grand jury process, disclosure should have been denied. Under the facts of the instant case, the policies against grand jury disclosure all should be applied in favor of Coleman. Coleman's name and business can be irrevocably tarnished by disclosure of the Grand Jury documents; "HEW" civil officials can use their knowledge to influence potential witnesses, and the course of the investigation. Moreover, it is not clear how the Trial Court's valiant attempts to prohibit unauthorized disclosure would be enforced as to individual "HEW" agents or other employees of "HEW" who were not party to these proceedings. In any event, after the fact contempt proceedings clearly would be of little or no benefit to Coleman.⁹

9. It is noted in this connection that the order entered by the Court for disclosure was too broad, as it was not shown why the Government had a "particularized need" for all the materials for which disclosure was sought.

(2) As noted above, *U.S. v. Procter & Gamble* clearly held that a showing of abuse of grand jury process would require denial of an application for disclosure of grand jury documents. Coleman clearly had such proof, and the Court was clearly in error for rejecting such evidence as irrelevant.

As was noted recently by the Sixth Circuit, there is a conflict of interest in a grand jury investigation between, on the one hand, the Department of Justice Attorneys, which is interested only in the criminal aspects of the case, and on the other hand, the Internal Revenue Service, which is interested in the civil aspects of the case. The Court held that the participation of an Internal Revenue Service Attorney in the Grand Jury proceedings constituted a conflict of interest such that the Grand Jury proceedings should be terminated. See *In re Grand Jury Subpoenas*, 573 F.2d 936 (6th Cir. 1978). Appellant understands that the panel decision in this case was reversed by En Banc Court on the ground that an interlocutory appeal in the facts of the case did not lie (see discussion, *infra*).¹⁰ The Sixth Circuit case has peculiar applicability to the instant case, as Coleman has proffered evidence that the Grand Jury was already used to further the civil aspects of "HEW's" case. Coleman also had evidence that civil agents were actively participating in the criminal investigation of this case, including agents of the Compliance Division of "HEW".

10. The Court discussed with approval *Wood v. Georgia*, 370 U.S. 375 (1962), wherein Mr. Chief Justice Warren stated: "Historically, this body [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." at p. 943.

(3) Finally, the Court ordered disclosure to "HEW" of Grand Jury materials as to administrative proceedings which may or may not result in judicial proceedings. Disclosure is proper as to matters "preliminary to a judicial proceeding" under Rule 6(e) only when judicial action is necessary following administrative proceedings. See discussion of cases in the case of *Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973) at pp. 896-897. See also *In re Disclosure of Grand Jury Testimony (Troia)*, 580 F.2d 281 (8th Cir. 1978) (proceeding for disbaring lawyers and removing lawyers "designed to culminate in a judicial proceeding").¹¹ There was no showing in this case that judicial proceedings would necessarily follow or were even contemplated after administrative review and relief under Rule 6(e) should have been denied.

2. There is a conflict between the circuits as to whether an order granting disclosure of grand jury documents is an appealable order.

The Third Circuit (as did the Eighth Circuit implicitly in this case) has held that an interlocutory appeal under

11. As a matter of fact, some cases hold that the "judicial proceedings" referred to in Rule 6(e) must be federal court proceedings. See *U.S. v. Downey*, (D.C. Ill. 1961) 195 F.Supp. 581, 584; *U.S. v. Crolich*, (D.C. Ala. 1952) 101 F.Supp. 782, 784. If this Court follows the holdings in those cases, clearly disclosure of these grand jury materials for use in proceedings which are not presently before a federal court was clearly erroneous.

It is to be further noted that investigation by the federal agencies preliminary to ex parte administrative proceedings have been excluded from the reach of Rule 6(e). See *In re Grand Jury Proceedings*, 309 F.2d 440, 443-44 (3rd Cir. 1962); *Application of United Electrical, Radio and Machine Workers of America*, 11 F.Supp. 858, 866, Note 24 (S.D. N.Y. 1953), which questioned whether an investigation by the National Labor Relations Board (NLRB) is preliminary to or in connection with the judicial proceeding. See also *In re April, 1956 Term Grand Jury*, 239 F.2d 263, 271 (7th Cir. 1956), which held:

"We find nothing in the history of the grand jury to justify the perversion of its functions or machinery by a third person for the purpose of a civil proceeding. . . ."

the provisions of 28 U.S.C. 1292(b) does lie under these circumstances. See *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373 (3rd Cir. 1976). See Comment, "Interlocutory Appeals in Criminal Cases: An Open But Closely Guarded Door", 66 Geo. L.J. 1163, at pp. 1168-1171 (1978). Other cases have held that mandamus under 28 U.S.C. Section 1651 lies under certain circumstances, to-wit: *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373 (3rd Cir. 1976); *In re Grand Jury Investigation*, 338 F.Supp. 1379 (W.D. Pa. 1972); *In re Grand Jury Proceedings*, No. 78-1089 (1st Cir., July 11, 1978, at p. 8, Slip Opinion); Comment, "Interlocutory Appeals in Criminal Cases: An Open But Closely Guarded Door," 66 Geo. L.J. 1163, at pp. 1168-1171 (1978). In the alternative, this Court has jurisdiction to hear this matter as a petition for mandamus under the All Writs Statute, 28 U.S.C. Sec. 1651. Mandamus lies when a court of appeals has issues of unusual importance to the economical and efficient administration of justice; to correct errors or abuses on the part of district courts in grand jury proceedings; and where there are issues of first impression, all of which circumstances are present in the instant case. See *In re April, 1977 Grand Jury Subpoenas (General Motors)*, 573 F.2d 936 (6th Cir. 1978) (panel opinion), *reversed* (en banc), 584 F.2d 1366 (6th Cir. 1978); *Application of Johnson*, 484 F.2d 791, 794, at Note 2 (7th Cir. 1973); *U.S. v. U.S. District Court for the Southern District of West Virginia*, 238 F.2d 713, at 719 (4th Cir. 1956); *In re Grand Jury Proceedings*, No. 78-1089 (1st Cir. 1978), 480 F.2d 13 (1st Cir. 1978); *U.S. v. Briggs*, 514 F.2d 794, at 808 (5th Cir. 1975).

The Sixth Circuit has taken contrary views of both the use of mandamus and interlocutory appeal in these circumstances. *In re April, 1977 Grand Jury Subpoenas*, op. cit., pet. for cert. filed, 11/3/78, Case No. 78-739.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

JAMES R. WYRSCH
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Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 78-1688

Coleman American Companies, Inc.,
Appellant,

v.

United States of America,
Appellee.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: January 12, 1979
Filed: January 31, 1979

Before BRIGHT and ROSS, Circuit Judges, and VAN
SICKLE, District Judge.*

PER CURIAM.

In this appeal Coleman American Companies, Inc. (hereinafter Coleman) claims that the district court¹ erred granting the government's request for disclosure of certain

*The Honorable BRUCE M. VAN SICKLE, United States District Judge for the District of North Dakota, sitting by designation.

1. The Honorable William H. Becker, Senior District Judge, Western District of Missouri.

grand jury documents to the Department of Health, Education and Welfare for use in a civil case. The trial court certified the case to us under 28 U.S.C. § 1292(b). By order of September 22, 1978, this court permitted the interlocutory appeal.

In support of its contentions Coleman argues that:

1. The court erred in granting the government disclosure of certain of the grand jury documents because (a) grand jury documents may never be disclosed without a showing of particularized need, and (b) the holding of *United States v. Interstate Dress Carriers*, 280 F.2d 52 (2nd Cir. 1960), applied by the trial court in granting disclosure as to some of the documents requested by the government does not apply (1) when there is an ongoing grand jury investigation; (2) where there is or may be proof that the grand jury investigation has been subverted; and (3) because FED. R. CRIM P. 6(e) does not authorize disclosure of grand jury documents even when such documents are otherwise subject to audit and inspection by an administrative agency.

2. The trial court erred in ordering disclosure of certain grand jury documents under the facts of this case because (a) the only showing of "particularized need" by the government was that it would be administratively convenient for HEW to have the grand jury documents and administrative convenience does not constitute a showing of "particularized need," especially when the grand jury investigation was still ongoing; (b) the grand jury process had already been subverted by improper disclosure of grand jury documents by the government; and (c) disclosure was ordered for use by HEW in proceedings which were not "judicial proceedings" within the meaning of FED. R. CRIM. P. 6(e).

We have examined the record, the in camera files and the briefs of the parties. The facts and the law are adequately discussed in Judge Becker's three in camera orders of August 10, 1978, August 14, 1978, and August 24, 1978. We affirm the holdings of the district court for the reasons set forth in those three orders.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

[Not to be published.]